No. 92-1500

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PAUL CASPARI AND JEREMIAH W. (JAY) NIXON,

Petitioners,

v.

CHRISTOPHER BOHLEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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The Eighth Circuit's opinion included in Petitioners' Appendix at A-3 is inaccurate because its conclusion at page A-23 was not the Court's final conclusion. The conclusion was amended, as indicated by the court order set forth on pages A-1 and A-2 of Petitioners' Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 558.016, RSMo 1984 provides:

Extended terms for persistent or dangerous offenders - definitions. -

1. The court may sentence a person who has pleaded guilty to or has been found guilty of a class B, C, or D felony to a term of imprisonment as authorized by section 558.011, if it finds the defendant is a prior offender, or to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender.

2. A "prior offender" is one who has pleaded guilty to or has been found guilty of one felony.

3. A "persistent offender" is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times.

4. A "dangerous offender" is one who:

(1) Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and

(2) Has pleaded guilty to or has been found guilty of a class A or B felony or a dangerous felony.

5. The pleas or findings of guilty shall be prior to the date of commission of the present offense.

6. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class A felony, any sentence authorized for a class A felony:

(2) For a class B felony, a term of years not to exceed thirty years;

(3) For a class C felony, a term of years not to exceed fifteen years;

(4) For a class D felony, a term of years not to exceed ten years.

Section 558.021, RSMo 1984 provides:

Extended term procedures -

1. The court shall find the defendant to be a prior offender, persistent offender, or dangerous offender, if

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is a prior offender, persistent offender, or dangerous offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, or dangerous offender.

2. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of their hearing, except the facts required by subdivision (1) of subsection 4 of section 558.016 may be established and found at a later time, but prior to sentencing, and may be established by judicial notice of prior testimony before the jury.

3. In a trial without a jury or upon a plea of guilty, the court may defer the proof and findings of such facts to a later time, but prior to sentencing. The facts required by subdivision (1) of subsection 4 of section 558.016 may be established by judicial notice of prior testimony or the plea of guilty.

4. The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings.

5. The defendant may waive proof of the facts alleged.

6. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

7. At the sentencing hearing both the state and the defendant shall be permitted to present additional

information bearing on the issue of sentence.

STATEMENT OF CASE

Contrary to Petitioners' contention on page 14 of their Petition, the Eighth Circuit did not order Respondent Christopher Bohlen to be released from custody unless the state resentenced him without invoking the persistent offender statute. The Eighth Circuit originally issued such an order. Petitioners' Appendix at A-23. The Eighth Circuit, however, granted Respondent Christopher Bohlen's Motion to Amend the Judgment and deleted the language "directing the Missouri circuit court to resentence Bohlen without application of the persistent offenders statute" and instead ordered the Missouri circuit court to issue "a conditional writ of habeas corpus consistent with this opinion." Id., at A-1.

SUMMARY OF ARGUMENT

This Court should not review the decision of the Eighth Circuit because there is no basis for a review of the decision in that there is no conflict in the circuits on any issue presented, there is not an important question of federal law involved in the case, and there has been no departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. Rule 10(a).

The holding of this Court in Bullington v. Missouri, 451 U.S. 430 (1981) is applicable to Respondent's case because Respondent was placed twice in jeopardy when the State failed to present any evidence at a sentencing hearing, a hearing which contained all of the hallmarks of a criminal trial (A-42, 44), but two years later was permitted to present evidence at a second sentencing hearing. Petitioners' representations that there is a split in the various circuits that have addressed similar claims is erroneous because the decisions in those courts focused on whether a retrial was permissible because of trial court error and not because of a failure of proof. The principle applied by the Eighth Circuit is not barred by Teague v. Lane, 489 U.S. 288 (1989) because the Eighth Circuit based its decision on precedent applicable at the time Respondent's judgment and sentence became final on June 19, 1984.

There is no need to revisit or reverse Bullington, supra. This Court has declined to disturb holdings that double jeopardy applies to non-capital sentencing proceedings. Petitioners and amici have not established a valid basis for revisiting or

reversing Bullington. The arguments advanced by amici and Petitioners were considered by this Court in 1981 and were rejected. Furthermore it would be improper to revisit Bullington because Bohlen's sentence was not and could not have been a death sentence.

ARGUMENT

I.

BULLINGTON IS APPLICABLE TO RESPONDENT'S NON-CAPITAL SENTENCING PROCEEDING.

Bullington v. Missouri, 451 U.S. 430, 446 (1981) held that the double jeopardy clause applies to a sentencing proceeding when the proceeding closely resembles a criminal trial. In Burks v. United States, 437 U.S. 1 (1978), this Court held that double jeopardy precludes a second trial when the original trial was reversed based on the insufficiency of the evidence, as distinguished from a reversal based on trial error. In the present case, the State of Missouri failed to present any evidence[1] at the initial sentencing hearing, a hearing with all of the hallmarks of a criminal trial,[2] (A-13, 22) and thus, was barred by the double jeopardy clause from submitting evidence at a second sentencing hearing. Double jeopardy forbids a second hearing to afford the prosecution an opportunity to supply evidence it failed to present in the first proceeding. United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Burks, supra at 11.

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[1] During the original trial proceeding, the State failed to produce any evidence to prove that Respondent was a persistent offender.

[2] At the hearing to determine persistent offender status, defendants in Missouri have: (1) full rights of confrontation and cross-examination; (2) the opportunity to present evidence; and (3) the burden of proof placed on the State requiring it to produce evidence that proves beyond a reasonable doubt that the defendant is a persistent offender. Sections 558.021.1(2), and 558.021.4, RSMo 1981.

Petitioners contend that the issue they present before this Court was left open in Lockhart v. Nelson, 488 U.S. 33, 37-38 n.6 (1988). In Nelson, the Supreme Court assumed that the double jeopardy clause applied to non-capital sentencing proceedings because the courts below and the State had conceded the principle. Id. This Court found no need to review the issue in Nelson and Petitioners have advanced no acceptable or compelling reason why this Court should review their claim.

Petitioners claim that Bullington is distinguishable from the present case because there was a lack of sentencing discretion in Bullington's case, which is not present in Respondent's case. In Bullington, the trier of fact would determine whether "yes", the death penalty was warranted, or "no", the death penalty was not warranted. In the present case, the trier of fact was required to make just such a "yes/no" decision and thus, lacked broad sentencing discretion, as in Bullington. The judge in the present case had to decide whether Respondent was a persistent offender ("yes") or not a persistent offender ("no"). The present case is identical to the situation in Bullington and analogous to the guilt/innocent decision, because the fact finder must choose between two alternatives, instead of a sentencing decision in which a judge makes a choice among a broad spectrum of possible punishments. Bullington, supra at 440-441: Kadish, "Legal Norm and Discretion in the Police and Sentencing Processes," 75 Harv. L. Rev. 904, 916 (1962) (Where the judge has power to select a term of

imprisonment within a range the exercise of that authority is left fairly at large.")

Petitioners contend that there is a conflict in the circuits citing Hunt v. New York, 112 S. Ct. 432 (1991). Petitioners would have this Court rely on a single dissent from a denial of certiorari. Hunt, supra at 432. The denial of certiorari of a claim that the double jeopardy clause does not apply to non-capital sentencing proceedings is consistent with and supportive of Respondent's position. There is no need to address the issue again in this case. French v. Estelle, 692 F.2d 1021 (5th Cir. 1982), cert. denied, 461 U.S. 937 (1983). Given the opportunity, the Supreme Court has declined to disturb holdings that double jeopardy applies to non-capital sentencing proceedings. See e.g., Durosko v. Lewis, 882 F.2d 357 (9th Cir. 1989), cert. denied, 110 S. Ct. 1930 (1989); Nelson v. Lockhart, 828 F.2d 446 (8th Cir. 1987), reversed on other grounds, 488 U.S. 33 (1988); French, supra; Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), vacated on other grounds, 459 U.S. 1139 (1983). The dissenting opinion in Hunt does not claim that there exists a split in the circuits and does not support the proposition that the double jeopardy clause is inapplicable to non-capital sentencing enhancement proceedings. Hunt, supra at 432.

The alleged split in the circuits is illusory. Upon review of the opinions of the various circuit courts, it becomes clear that the circuit courts focus on whether there was an insufficiency of

the evidence or trial error, finding double jeopardy implications for the former, but not the latter.

Petitioners claim Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211 (1983) supports their position that a defendant may be acquitted of a crime, but not of a sentence.[3] Linam, however, is distinguishable from the present case because in Linam the evidence was incorrectly excluded. The prosecution in Linam did not fail to meet its burden of proof, but was thwarted from doing so by trial court error. In the present case, the prosecutor completely failed to carry or advance his burden of proof. "In Burks and again in Bullington the [United States Supreme] Court emphasized that failure of the prosecution to prove facts when it has an unfettered opportunity to do so results in reversible error because of insufficient evidence." Bullard, supra at 1359. A total failure of proof is distinguishable from those situations in which evidence was produced, but excluded erroneously. Tate v. Armontrout, 914 F.2d 1022, 1026 (8th Cir. 1990).

In the present case, the State must be held accountable for its failure to produce evidence of the prior convictions. The State had an "unfettered opportunity" to prove persistent offender status. Bullard, supra at 1359. In the present case, as in the situation in which the State fails to produce evidence in a

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[3] It was not Respondent's claim in the court below that he had been acquitted of a "sentence" but rather that the State had failed to muster the necessary evidence to support classifying him as a persistent offender.

criminal trial to support an element of the offense, that failure precludes the State from a second opportunity to muster its evidence and present the proof. The State is not permitted to return to the trial court again and again to make its case. The State, by its own error and omission, surrendered its single opportunity to present its proof at the first sentencing proceeding. The State was allowed "one bite at the prosecution apple" and should not be permitted a "second". Burks, supra at 17.

Petitioners argue Denton v. Duckworth, 873 F.2d 144, 148 (7th Cir.), cert. denied, 110 S. Ct. 341 (1989) supports their proposition that Bullington is not applicable to sentencing enhancement proceedings. Denton is distinguishable from the present case. In Denton, the State's partial reliance on one invalid conviction did not negate the other conviction evidence that was sufficient to find that the defendant was a habitual offender. In the present case, however, there was a total failure of proof. The evidence was not only insufficient, it was non-existent.

Petitioners claim that the persistent offender hearing is not a trial on the punishment, as was the situation in Bullington. The sentencing proceeding in Respondent's present case closely resembled a criminal trial because Missouri legislature installed as a prerequisite all the traditional hallmarks of a criminal trial. The State is required to prove its case for sentencing enhancement beyond a reasonable doubt. Section 558.021.1(2), RSMo 1984. The defendant at the sentencing enhancement proceeding is

afforded Sixth Amendment rights to full confrontation and cross-examination of the witnesses and is granted the opportunity to present evidence. Section 558.021.4, RSMo 1984. The trier of fact must find that the State has met its burden of proof beyond a reasonable doubt. Section 558.021.1(3), RSMo 1984. The standard of requiring proof beyond a reasonable doubt, the right to confrontation and cross-examination, and the right to present evidence, are all requirements necessary to sustain a conviction at a criminal trial. The persistent offender hearing closely resembled a criminal trial because its procedure required and included all the hallmarks of an adversarial criminal proceeding.

Petitioners claim that Respondent is barred from raising the claim he presented in the lower courts by Teague v. Lane, 489 U.S. 288 (1989). Petitioners have not cited, because they cannot cite, controlling law that Teague would bar Respondent's claim.

The double jeopardy ruling which is applicable is dictated by the 1978 case of Burks v. United States, 437 U.S. 1 (1978) (double jeopardy precludes a second trial when the original trial was reversed based on insufficiency of the evidence, which is distinguishable from a reversal based on trial error) and Bullington, supra (double jeopardy precludes a second sentencing proceeding when the proceeding closely resembles a criminal trial). See Penry v. Lynaugh, 492 U.S. 302, 314-315 (1989) (the holding requiring a jury instruction regarding mental retardation and an abused childhood on the issue of mitigation, was not a "new rule" because it was a rule dictated by two prior cases). Neither

Nelson, supra nor Tate, supra broke new ground or imposed new obligations on the prosecutor. Teague, supra at 301.

The issue is whether double jeopardy principles apply to successive sentencing enhancement proceeding. The Court in Bullington, supra at 446 held that proceedings that have the hallmarks of a criminal trial are subject to the double jeopardy clause. Respondent's sentencing proceeding closely resembled a criminal trial and thus, double jeopardy applied to preclude a successive sentencing proceeding when there had been a complete failure of proof at the original sentencing proceeding. This principle is not based on "new law." Teague does not bar federal review because the result Respondent seeks is dictated by and is a natural consequence of the precedent established by the 1981 decision in Bullington, a case which existed at the time Respondent's conviction became final on June 19, 1984. State v. Bohlen, 670 S.W.2d 119 (Mo. App. 1984).

Furthermore, a "new rule" should be applied retroactively if it requires the observance of those procedures "implicit in the concept of ordered liberty". Id., at 307. The prohibition against double jeopardy is such a procedure. Green v. United States, 355 U.S. 184, 187 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

anxiety and insecurity ... ") (emphasis added). Thus, the law should be applied retroactively in the present case even if this Court finds that the double jeopardy claims made by Respondent consist of "new law" under Teague.

Petitioners seek to insulate the Missouri court's decision because it is, in their opinion, a "reasonable good-faith interpretation of existing precedent." Respondent's Brief, at 21. If the single standard for review of a State court interpretation of a federal right was whether the interpretation was "reasonable or in good-faith", the State court would be the sole determiner of federal constitutional claims. Any review by federal courts would be barred by Teague absent an admission that the state court was not acting reasonably or in good faith. Certainly, that was not the intent of Teague.

The Eighth Circuit, recognized that the application of Bullington to the present case was "not a sufficient stretch to cause it to be a new rule under Teague". Petitioners' Appendix, at A-22.

None of Petitioners' claims either involve important questions of federal law or raise a conflict with federal law. Thus, none of the claims warrant the granting of a Writ of Certiorari by this Court.

II.

BULLINGTON NEED NOT AND SHOULD NOT BE REVISITED OR REVERSED.

Petitioners and amici advocate reversal of Bullington because it conflicts with precedent existing prior to Bullington and wrongly expands upon the principles annunciated in North Carolina v. Pearce, 395 U.S. 711 (1969). Bullington is readily distinguishable from Pearce, because in Pearce, "there was no separate sentencing proceeding in which the prosecution was required to prove -- beyond a reasonable doubt or otherwise -- additional facts in order to justify the particular sentence." Bullington, supra at 439. The decision in Pearce does not effect the continued vitality of Bullington, a case decided more than a decade later.

Although Petitioners claim that Bullington has lost its vitality, the Supreme Court has yet to question the continued viability of Bullington's holding. See Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (Respondent "has suggested no reason sufficient to warrant [the Court] taking the exceptional action of overruling Bullington"). Numerous decisions of the United States Supreme Court have recognized Bullington's continued vitality. See e.g., Poland v. Arizona, 476 U.S. 147, 152-154 (1986); Rumsey, supra at 205-212 (Bullington dictates holding that Arizona's capital sentencing proceeding resembled a trial for purposes of the double jeopardy clause and thus, double jeopardy precluded a death sentence after the defendant had initially received a life sentence); and Spaziano v. Florida, 468 U.S. 447, 458 (1984).

The Supreme Court has denied certiorari in non-capital cases involving the application of double jeopardy principles to sentence enhancement proceedings. Hunt, supra at 432; French v. Estelle, 692 F.2d 1021 (5th Cir. 1982), cert. denied, 461 U.S. 937 (1983). Although given the opportunity, the Supreme Court has declined to disturb holdings that double jeopardy applies to non-capital sentencing proceedings. See, e.g. Nelson v. Lockhart, 828 F.2d 446 (8th Cir. 1987), reversed on other grounds, 488 U.S. 33 (1988); French, supra; Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), vacated on other grounds, 459 U.S. 1139 (1983).

The amici position that the double jeopardy clause should depend on the nature of the sentence and not the nature of the sentencing procedures was decided by Bullington and amici has advanced no valid reason to revisit the issue. Petitioners and amici undoubtedly wish this Court to adopt Justice Powell's dissent in Bullington, which was rejected by the majority of the Court when the case was briefed, argued and decided.

The amici argue that Stroud v. United States, 251 U.S. 15 (1919); United States v. DiFrancesco, 449 U.S. 117 (1980); North Carolina v. Pearce, 395 U.S. 711 (1969); and Chaffin v. Stynchcombe, 412 U.S. 17 (1973) require reversal of Bullington. This Court, in its decision in Bullington, addressed and distinguished each of those cases. None involved sentencing procedures which had the hallmarks of a criminal trial. Bullington, supra at 438-446 and thus did not trigger double jeopardy protections.

Petitioners claim that the double jeopardy concerns are "de minimis given the extra constitutional protections [that flow] from the Eighth Amendment." Petitioners' Brief, at 25-26. Citing a long string of United States Supreme Court decisions, amici argue that the death sentence should not be treated differently than other sentences. The death penalty is not an issue in the present case. The amici's concern about death penalty jurisprudence is not properly before this Court. All constitutional rights must be preserved. The suggestion that protection of one right justifies forfeiture of another should be rejected. Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

None of Petitioners' claims either involve important questions of federal law or raise a conflict with federal law. Thus, none of the claims warrant the granting of a Writ of Certiorari by this Court. There is no need to revisit this issue.

CONCLUSION

Respondent Christopher Bohlen respectfully requests this Court deny issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and deny reversal of the Eighth Circuit's judgment on the ground that this case should not be reviewed by this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify and acknowledge that I am a member of the Bar of this Court, and that I have served a true and correct copy of the Brief in Opposition to Petition in the case of Paul Caspari v. Christopher Bohlen to all parties involved in the action by mailing a copy of the Brief, first class, postage-prepaid to: Jeremiah W. (Jay) Nixon, Stephen D. Hawke, and Frank A. Jung, Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102 (314) 751-3321 on this 13th day of May, 1993.

Richard H. Sindel
Attorney for Respondent
Christopher Bohlen
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I hereby certify that on this 13th day of May, 1993, the Brief in Opposition to Petition in the case of Caspari v. Bohlen was mailed to the Clerk of the United States first-class, postage prepaid.

Richard H. Sindel